

IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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IN RE:

PETITION FOR EXEMPTION OF
CERTAIN SERVICES

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T.R.A. DOCKET ROOM

DOCKET NO. 03-00391

**CONSUMER ADVOCATE AND PROTECTION DIVISION'S MOTION TO COMPEL
DISCOVERY AND FILE SUPPLEMENTAL TESTIMONY**

Comes now Paul G. Summers, Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") and respectfully requests the Tennessee Regulatory Authority ("TRA") to compel discovery and allow the Consumer Advocate to file supplemental testimony.

As grounds for this motion, the Consumer Advocate would show the following:

1. BellSouth Telecommunications Inc. ("BellSouth") has attached documents to its rebuttal testimony that the Consumer Advocate requested, but was not provided, during the discovery phase of this docket because BellSouth stated that the requested documents did not exist or could not be located. The specific request and response are set forth below.

2. BellSouth's failure to timely provide the requested information during discovery and instead surprise the Consumer Advocate with this information in rebuttal testimony has prejudiced the Consumer Advocate. In particular, the Consumer Advocate's direct testimony and conclusions would have been different had the Consumer Advocate been provided with the requested information prior to filing its testimony.

3. On August 30, 2004, the Consumer Advocate propounded the following interrogatory

upon BellSouth:

Interrogatory No. 10

Since January 1, 1999, has the Company ever reduced the price of any Primary Rate ISDN service offering in response to a competitive offering of such service (or service substitute) by a competing company or person? If so, provide a summary of each such rate reduction, including a description of the competitive offering that prompted the rate reduction.

4. On August 16, 2004, BellSouth responded in pertinent part to Interrogatory No. 10

as follows:

Response: Yes. Since January 1, 1999, BellSouth has entered into numerous contract service arrangements and tariffed promotions which have included price reductions for Primary Rate ISDN service. A list of CSAs is provided in Attachment 1.

BellSouth attached a list of approximately 594 CSAs for PRI ISDN service.

5. On August 30, 2004, the Consumer Advocate propounded the following request for production of documents upon BellSouth:

Request for Production No. 1

Provide a copy of every Revenue, Cost & Contribution Summary for every CSA offering PRI-ISDN in Tennessee. Include in your response all volume and term CSAs providing PRI ISDN in Tennessee.

6. On September 13, 2004, BellSouth made the following response to this request:

This information is proprietary and is provided under separate cover.

7. BellSouth provided only a partial response; of the approximately 594 CSAs identified by BellSouth, the Consumer Advocate received the requested Revenue, Cost & Contribution Summary documents for approximately 240 CSAs.

8. With regard to the approximately 354 CSAs for which the Consumer Advocate did not receive the requested documents, counsel for the Consumer Advocate contacted counsel for

BellSouth in an effort to obtain such documents. After checking into the matter, BellSouth informed the Consumer Advocate that the requested documents either did not exist or could not be located but that BellSouth would provide the Consumer Advocate with the documents if BellSouth obtained them. Counsel for the Consumer Advocate took BellSouth's answer in good faith and, therefore, did not file a motion to compel.

9. The Consumer Advocate's August 30th discovery request stated on page 2:

These Discovery Requests are to be considered continuing in nature, and are to be supplemented from time to time as information is received by the Company which would make a prior response inaccurate, incomplete, or incorrect.

10. Additionally, Rule 26.05(2) of the Tennessee Rules of Civil Procedure requires a party to timely supplement its discovery response if the party obtains information that makes a prior response incorrect and if failure to supplement would constitute a knowing concealment of the information. A party's testimony may be excluded if it fails to comply with Tenn. R. Civ. P. 26.05. *See Ammons v Bonilla*, 886 S.W.2d 239, 243 (Tenn. Ct. App. 1994), *Strickland v. Strickland*, 618 S.W.2d 496, 501 (Tenn. Ct. App. 1981).

11. In a contested case before the TRA, discovery is sought and effectuated in accordance with the Tennessee Rules of Civil Procedure. *See* TRA Rule 1220-1-2-.11(1). This docket is a contested case. *See* Order Convening a Contested Case and Appointing a Hearing Officer, Docket No. 03-00391 (Sept. 29, 2003). The Consumer Advocate is a party to this contested case. *See* Order Granting Petition to Intervene and Adopting Procedural Schedule, Docket No. 03-00391 (Jan. 8, 2004).

12. BellSouth never supplemented its discovery responses to provide all of the Revenue,

Cost & Contribution Summary documents requested by the Consumer Advocate. In particular, these documents were not provided for the CSAs that were filed under TRA Nos. 20030851 and 2004-0227 and included on BellSouth's list of CSAs for PRI service.

13. Notwithstanding the Consumer Advocate's prior discovery request specifically seeking the Revenue, Cost & Contribution Summary for all PRI CSAs, and notwithstanding BellSouth's duty to timely supplement its discovery responses, BellSouth provided the requested documents for two CSAs — TRA Nos. 20030851 and 2004-0227 — to the Consumer Advocate *for the first time in exhibits to rebuttal testimony*. See Rebuttal Testimony of Kathy Blake, Exhibit No. KKB-2.

14. BellSouth's failure to comply with Tenn. R. Civ. P. 26.05(2) has prejudiced the Consumer Advocate. In particular, had the requested documents been provided in a timely fashion as opposed to being sprung on the Consumer Advocate in BellSouth's rebuttal testimony, the Consumer Advocate's direct testimony and conclusions would have been different.


15. Based on the requested information that has finally been revealed to the Consumer Advocate through BellSouth's rebuttal testimony, the Consumer Advocate's direct testimony would have been as indicated in the Supplemental Testimony of Terry Buckner, attached hereto.

WHEREFORE, the Consumer Advocate respectfully requests the TRA to remedy the prejudice shown to the Consumer Advocate by: (1) either striking the relevant portions of the Rebuttal Testimony of Kathy Blake, which includes Blake Rebuttal at p. 11, lines 15-25 and p. 12, lines 1-3, and Exhibit No. KKB-2, pp. 1-2, or allowing the Consumer Advocate to file into the record and admit into evidence the Supplemental Testimony of Terry Buckner, attached hereto; (2) ordering BellSouth to fully respond and produce to the Consumer Advocate all of the Revenue, Cost &

Contribution Summaries requested by the Consumer Advocate on August 30th; (3) allowing the Consumer Advocate to timely supplement its testimony in order to address any issues that may be raised as a result of the Consumer Advocate's review and analysis of these documents; and (4) scheduling a pre-hearing conference to address the remaining procedural schedule, including the need to postpone the hearing on the merits scheduled for November 8, 2004, if BellSouth does not fully supplement its discovery response by October 27, 2004.

RESPECTFULLY SUBMITTED,

PAUL G. SUMMERS, B.P.R. #6285
Attorney General and Reporter


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Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
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(615) 532-2590

Dated: October 22, 2004

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via facsimile and first-class U.S. Mail, postage prepaid, on October 22, 2004, upon:

Joelle Phillips, Esq.
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
Facsimile: 615-214-7406

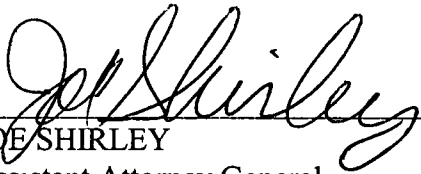
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Assistant Attorney General

79653

Before the

TENNESSEE REGULATORY AUTHORITY

IN RE:

**BELLSOUTH TELECOMMUNICATIONS, INC., CITIZENS
COMMUNICATIONS, INC., UNITED TELEPHONE-SOUTHEAST, INC.
PETITION FOR EXEMPTION OF CERTAIN SERVICES**

DOCKET NO. 03-00391

**SUPPLEMENTAL TESTIMONY
OF
TERRY BUCKNER**

October 22, 2004

1 **Q. Please state your name for the record.**

2 A. My name is Terry Buckner.

3

4 **Q. By whom are you employed and what is your position?**

5 A. I am employed by the Consumer Advocate and Protection
6 Division ("CAPD") in the Office of the Attorney General for the state
7 of Tennessee ("Office") as a Regulatory Analyst.

8

9 **Q. What is the purpose of your testimony?**

10 A. The purpose of my testimony is to supplement my written
11 direct testimony filed with the TRA in this docket.

12

13 **Q. What is the basis for your supplemental testimony in this docket?**

14 A. BellSouth provided rebuttal testimony and a related rebuttal
15 exhibit¹ with information previously requested, but not provided to
16 the CAPD. This information was relevant to conclusions made in my
17 direct testimony with related exhibits, and had I been provided the
18 information, as requested, my direct testimony would have been
19 different.²

¹K. Blake rebuttal testimony, Page 11, Lines 15-25 and Page 12, Lines 1-3. K. Blake Exhibit No. KKB-2 Pages 1-2.

²T. Buckner direct testimony, Page 5, Lines 13-16. T. Buckner proprietary exhibit, Schedule 6

1 **Q. How would your testimony and related conclusions been**
2 **different?**

3 A. Based on the rebuttal testimony and related exhibit of
4 BellSouth, two PRI ISDN CSAs (Tariffs #2003851 and #040227)
5 revenue contributions are **not** less than their respective costs over the
6 term of the contracts. My direct testimony and conclusions on Page
7 5, Lines 13-16 and related proprietary exhibit, Schedule 6 would not
8 have been submitted. The financial reason for this revision is that
9 BellSouth had reduced the cost of an essential and the highest tariff
10 priced PRI ISDN element - PRI Interface by over 65% near the end of
11 2002. Consequently, this reported reduction in cost created
12 significantly more gross margin available for discounts by BellSouth
13 and reasonably explains the growth trend in the discount percentages
14 for PRI ISDN CSAs as shown Schedule 5 of my Non-Proprietary
15 Exhibits.

16

17 **Q. Does this conclude your testimony?**

18 A. Yes, it does.

19

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21

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

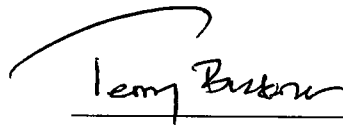
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COMMUNICATIONS, INC., UNITED TELEPHONE-SOUTHEAST, INC.
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AFFIDAVIT

I, Terry Buckner, Regulatory Analyst, for the Consumer Advocate Division of the Attorney General's Office, hereby certify that the attached Supplemental Testimony represents my opinion in the above-referenced case and the opinion of the Consumer Advocate Division.


TERRY BUCKNER

Sworn to and subscribed before me
this 22th day of October, 2004.


NOTARY PUBLIC

My commission expires: Sept. 22, 2007

